20908

No. [redacted]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERLE G. SWANSON and
HELEN F. SWANSON,
husband and wife,

Appellants,

v.

COMMERCIAL ACCEPTANCE
CORPORATION, a Missouri
corporation,

Appellee.

APPELLANTS' BRIEF

Appeal from the United States District Court for the
District of Oregon

THE HONORABLE WILLIAM G. EAST, Judge

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No. 19018

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STATEMENT OF JURISDICTION

On February 24, 1964, appellants, both citizens and residents of the State of Washington, filed a civil action against The Fuline Corporation and Commercial Acceptance Corporation, both Missouri corporations, with places of business in that state (R.1). The amount in controversy

exceeds $10,000 (R.1, 44-45). Jurisdiction in the District Court was based on 28 U.S.C. §1332. On November 6, 1964, the court ordered that the issue as to whether the appellee, Commercial Acceptance Corporation, was a holder in due course be segregated and tried prior to the trial of the remaining issues (R.81). It was agreed that if the appellee was a holder in due course, it was entitled to judgment on its counterclaim (R. 52,53). After the trial on the segregated issue, the court determined that there was no just reason for delay in the entry of a final judgment upon such issue and directed entry of a final judgment in favor of the appellee, Commercial Acceptance Corporation, and against the appellants (R. 103). Appellants filed a timely notice of appeal (R. 107) from such final judgment (R. 107). The jurisdiction of this court is conferred by 28 U.S.C. §1291 and Rule 54(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

There is no dispute concerning the facts. They were set forth in an agreed statement of facts in the pre-trial order (R. 45-53), a stipulation of agreed testimony (Ex. 73), and the court's findings of fact based thereon and on the agreed documentary exhibits. The only question is whether or not the lower court was correct in its conclusion of law that the appellee was a holder in due course of two notes and, as such, took them free from defenses (R. 101).

On April 27, 1962, appellants applied to The Fuline Corporation (a defendant in the lower court but not an appellee in this court -- hereinafter called "Fuline") for a Fuline franchise under which appellants would purchase coffee-dispensing machines and operate them pursuant to the Fuline program (R.87). This application gave the background information concerning appellants, including their financial statement (Ex. 10-A).

Appellee is engaged in the business of purchasing commercial paper. During the three years prior to the transaction in question it had purchased from Fuline some 23 accounts totaling $391,000 out of purchases of similar paper from all sources approximately $3,100,000 (R.89, 90). On April 30, 1962, Fuline delivered to appellee a copy of appellants' application for a franchise, a copy of the verification of appellants' bank deposit (Ex. 10-B), and a written request for financing covering 40 coffee machines to be financed for appellants. This application contained a breakdown of the cost, down payment, finance charges, and monthly payments proposed (R.87, Ex.10-C). On the same date, the request for financing by Fuline was approved by appellee and Fuline was so advised. Fuline, in turn, advised appellants that their credit had been approved by the finance company (Ex. 2) and, on or about the same date, appellants and Fuline entered into the contemplated franchise agreement (R.87, Ex. 3).

On June 12, 1962, appellants purchased 40 coffee machines from Fuline. They executed in the State of Washington and

delivered to Fuline in the State of Kansas and payable there their written promissory note secured by a purchase-money mortgage on the machines (R. 87, 88). The purchase money mortgage and note (Ex. 6) contained the exact price, finance charges, and terms of sale which had been approved by appellee on April 30, 1962. The note and mortgage are on printed forms furnished by a corporation known as "Commerce Acceptance Company, Inc.", the parent corporation of appellee (R. 88, 89). The printed form of note and printed form of mortgage were attached together on the same piece of paper or form and included as a part thereof a printed form of endorsement to Commerce Acceptance Company, Inc. (Ex. 6, R.88,89). On June 13, 1962, for value paid by it, appellee purchased the foregoing note and mortgage after Fuline had executed the printed assignment on the mortgage and the endorsement on the note (R. 48, 89).

Late in May of 1962, Fuline made a telephone request of the appellee that it add an additional 20 dispenser machines to its earlier expressed approval of the request for the financing of the 40 machines on substantially the same terms approved by appellee (R.88).

On or about June 28, 1962, appellants purchased the 20 additional machines, made a down payment, and executed in the State of Washington and delivered to Fuline the second of the two promissory notes and purchase-money mortgages here involved. The note and mortgage are on identical printed forms provided by Commerce Acceptance Company, Inc. and having the same printed assignment and endorsement to Commerce Acceptance

Company, Inc. This note and mortgage was purchased by appellee on June 28, 1962 after the printed endorsements and assignments had been executed by Fuline (R. 48, 88, 89). The mortgaged coffee machines were situated in Clark County, Washington, and Multnomah County, Oregon (R. 46).

It was an agreed fact and the court found that appellee paid value for the notes prior to their maturity and without any notice of a defect in the title of Fuline or of any defense as far as the notes are concerned (R.91). The court concluded, as a matter of fact, that the naming and designating of Commerce Acceptance Company, Inc. was due to the mutual mistake and inadvertence of Fuline and appellee and that it was the mutual understanding and intention of the appellants, appellee and Fuline if notes were sold to appellee that they were to be transferred to it by proper endorsements and assignments by Fuline (R.92). It was agreed, and the court found, that Commerce Acceptance Company, Inc. never had any interest in or claim to the notes or their securing mortgages.

Subsequent to the commencement of these proceedings, Fuline executed and delivered to appellee a "Corrected Assignment" for each note and mortgage and a later "Correction, Clarification and Amendments of Corrected Assignment" for each note and mortgage (R. 92, Exs. 8,9,105,106). These documents were either acknowledged by Commerce Acceptance Company, Inc. or it was a party to each of these documents (R.92). Included as appendices to this brief are copies of Exhibits 8 and 105. Exhibits 9 and 106 are identical in text but relate to the

second of the notes and mortgages.

On February 24, 1964, appellants brought this action which is a suit to rescind the purchase of the coffee machines because of alleged breaches of warranty, defects in the machines, failure of the machines to meet electrical code requirements, etc. (R.1-4). Regardless of the merits of appellants' claim, it, of course, cannot be asserted against a holder in due course. By agreement and order of the court, this issue was segregated without any hearing as to the merits of appellants' claim (R.81). Since the holder in due course issue was resolved in favor of appellee, a final judgment was entered in its favor for the full amount due on the notes and the mortgages were ordered foreclosed. The lower court determined that there was no just reason for delay in entering a final judgment upon the appellee's counterclaim (R.103).

SPECIFICATION OF ERROR

The District Court erred in concluding that the appellee was a holder in due course and thus took the notes free of defenses. Such conclusion of law is erroneous because

(a) appellee participated in the transaction prior to the time the notes were drawn and therefore the negotiable instrument law was not applicable to the subsequently-issued notes which appellee was committed to purchase; and

(b) if the negotiable instruments law is applicable, there was no proper endorsement of the notes, and therefore

the appellee does not meet the statutory requirements for being a holder in due course.

SUMMARY OF ARGUMENT

Appellants are entitled to be heard on the merits unless the appellee is a holder in due course of a negotiable instrument. There are two equally valid reasons for holding that the appellee was not a holder in due course. In the first place, appellee participated in the transaction in question from its inception. Prior to the time the notes were written, the contemplated transaction was fully presented to the appellee with details concerning the property to be sold, the sales price, the finance charges, the terms of payment, and the names, addresses and financial standing of the prospective makers. The appellee approved an application and request to finance the transaction as submitted. The subsequently-drawn notes and mortgages were on forms supplied by appellee and in compliance with the appellee' commitment and contractual agreement to purchase the notes when tendered to it. Almost all enlightened courts have held that the foregoing facts would make the negotiable instrument law inapplicable. Independently of the foregoing, there was no proper endorsement of the notes in question to the appellee at the time the notes were purchased. The endorsements were only corrected after this action was commenced.

(a) The Negotiable Instruments Law Is Inapplicable Because Appellee Participated in the Transaction From Its Inception.

The lower court declined to deal with any conflict of law issues concluding that it was unnecessary to decide whether Missouri, Washington, Oregon, or Kansas law applied. At the applicable date each of the states had identical statutes. As to the case law concerning whether or not the negotiable instrument law is applicable, we see no difference in the laws of any of these states. However, as we will point out in the second portion of this brief, we believe that the law of the State of Oregon applies. Therefore, since this is a diversity case, the Oregon Supreme Court, under almost identical situation to the case at bar, held that where there was no proper endorsement of an instrument, it was subject to the defenses.

The applicable provisions of the negotiable instruments law are as follows:

> 71.191 Definitions. In this chapter, unless the context otherwise requires:
> * * *
> "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

> 71.030 What constitutes negotiation. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery.

> A holder in due course is a holder who has taken the instrument under the following conditions:
>
> (1) That it is complete and regular upon its face;
>
> (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
>
> (3) That he took it in good faith and for value;
>
> (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.
>
> 71.057 Rights of holder in due course. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

The above section numbers conform with the numbers in the negotiable instrument law and are the Oregon Revised Statutes in effect on the date of the transaction in question.

Appellants are making no claim here nor did they claim in the lower court that there was any lack of good faith on the part of the appellee, or that the appellee had any knowledge of defenses on the part of the appellants. What the appellants do contend is that while no single factor to be considered in and of itself would prevent the appellee from being a holder in due course, because of the combination of

factors found by the lower court, the negotiable instruments law has no application. Therefore, the ordinary rules applying to the assignment of a chose in action are applicable and appellants are not deprived of their defenses.

In almost all of the modern cases and, with few exceptions in the order cases, where the following circumstances exist, the endorsee of a note is not treated as a holder in due course. Such circumstances are:

(a) There is a history of past dealings between the payee and the endorsee, and the endorsee has been engaged in financing transactions for the payee.

(b) Prior to the purchase of the note, the endorsee is consulted in regard to the contemplated transaction, it examines the same, it obtains information concerning the prospective maker's credit, and approves the amount and terms of the note.

(c) The endorsee gives its commitment to purchase or discount the instrument when it is issued and tendered to it.

(d) The endorsee furnishes its printed form of note and mortgage, including a printed endorsement and assignment to the endorsee (the same being printed on the same sheet of paper).

(e) Pursuant to the foregoing arrangement, the instrument is prepared for the contemplated makers in accordance with the agreed terms, and is then purchased or discounted

by the endorsee.

There are numerous cases which hold that where one or more of the above factors are present, this does not necessarily prevent the endorsee from being a holder in due course. We make no contention that it does. In this connection, see the annotation in 44 ALR 2d at page 8, "Transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, as subject to defenses which chattel purchaser could assert against seller." However, where all of the above factors are present, as they are here, this constitutes active participation in the transaction. Where the finance company has actively participated in the transaction, it is in no position to state that it was a purchaser of a negotiable instrument within the meaning of the negotiable instruments law, and the courts so hold.

One of the leading cases is Commercial Credit Corp. v. Orange County Machine Works, 34 Cal.2d 766, 214 P2d 819, where the defense was basically the same as the defense in the case at bar, i.e., it did not involve fraud. In that case, just as in the case at bar, the finance company was approached by the seller and asked to finance the transaction. Definite arrangements were made to do so. The sale was then made using the finance company's forms. There was no evidence that the finance company had acted in bath faith or had any knowledge that there was a failure of consideration for the note at the

time it purchased it. The Supreme Court of California, in holding that the finance company was not a holder in due course, summarized the situation as follows:

> "When a finance company actively participates in a transaction of this type from its inception, counselling and aiding the future vendor-payee, it cannot be regarded as a holder in due course of the note given in the transaction and the defense of failure of consideration may properly be maintained."

Another factually similar and relatively recent case is Mutual Finance Company v. Martin, Fla., 63 So. 2d 649, 44 ALR 2d 1 There the facts are identical to those in the case at bar. There was a history of dealings between the finance company and the payee of the note. Before the note was issued, the finance company investigated the credit standing of the prospective buyer and agreed to purchase the contract and note in the event the prospective transaction was consummated. The finance company's printed form of assignment was used in drawing up the papers which were purchased by the finance company immediately upon their execution. It was not intimated or suggested that the finance company acted in bad faith or had any actual knowledge or information concerning defenses. The court was not willing to say that it would follow the rule in some states that if the note and mortgage were executed concurrently, they would be subject to defenses or, because they were on the same piece of paper, that this would make it subject to defenses. The court held that because of a

combination of all of these factors, plus the participation of the finance company in the arrangements leading up to the issuance of the note, prevented them from being given the treatment granted to a holder in due course under the negotiable instruments law.

Other like, well-reasoned cases are:

Commercial Credit Co. v. Childs, 199 Ark 1073, 137 SW 2d 260

Schuck v. Murdock Acceptance Corp., 220 Ark 56, 247 SW 2d 1.

Since this case was tried, there are two additional cases that support our position. In International Finance Corporation v. Rieger, ____Minn.____, 137 NW 2d 172, decided August 27, 1965, the situation was the same as in the case at bar. The finance company had arranged to purchase the note in question prior to the time that the same was executed, and its forms were used. There the lower court had held that the paper was subject to defenses, and, in affirming, the Supreme Court stated:

> "This is consistent with numerous decisions from various jurisdictions, including Minnesota, which hold that where a note has been executed concurrently with a conditional sale contract, an assignee of the note and conditional sale contract, who has participated in the transaction from its origin so as to have acquired knowledge of the conditional liability of the purchaser or maker of the note, does not become a holder of the note in due course."

Appellee had full notice that Fuline was selling the machines in question to appellants and that the note and the installments due thereon were in payment for the machines.

In the other recent case, Industrial Credit Company v. Mike Bradford & Co., _____Fla._____, 177 S 2d 878, the note was subject to defenses because

> "The record indicates.....appellant had investigated and approved the credit of appellees; appellant had furnished the agreement and note executed and had approved their terms....".

In United States v. Klatt, 135 F Supp 648, the United States was suing on a Federal Housing Administration Title I note which had been discounted by the Bank of America. If the Bank of America was a holder in due course of the note, then the United States was entitled to prevail. There, as here, the bank had been in on the transaction from the beginning in that they were to finance it and had furnished the forms to be signed by the purchaser. Based upon the authorities upon which we rely, the court concluded as follows:

> "***the relationship between the payee named in the instrument in suit and the bank, as to the entire transaction giving rise to the instrument, was such that the bank must be considered in effect a party to the original transaction between the named-payee dealer and the defendant; and the bank could not, therefore, in any event, be deemed a holder in due course of any negotiable instrument, executed as a part of the transaction."

(b) Appellee Cannot Be a Holder in Due Course Because the Endorsement to It Was Defective on Its Face.

This being a diversity case, the Court should apply the law which would be applied by the Oregon Supreme Court. Therefore, it is necessary to determine first what law would be applied, and then determine what the result would be under that law.

The counterclaim seeks to foreclose the chattel mortgages on the coffee machines situated in the State of Oregon. While the mortgages were actually executed in the State of Washington, they constituted a lien on personal property in the State of Oregon. The problem of the applicable state law arose in the District of Oregon in the unnreported case of Challenge-Cook Bros., Inc. v. Topline Equipment Co., Civil 63-278. In that case the plaintiff brought a civil action to obtain a judgment on a note and foreclose the securing trust receipt (lien on personal property). The note was payable in California, but the personal property covered by the trust receipt was situated in the State of Oregon. The precise question involved was the application of the appropriate parol evidence rule, it having been conceded that such rule is a matter of substance and not procedure and the ordinary rules of conflicts determine the choice of the law to be applied. In holding that the Oregon court would apply the law of the State of Oregon, the Honorable John F. Kilkenny cited the Oregon authorities and

stated his reasons for such conclusion, as follows:

> "Washington Investment Ass'n. v. Stanley, 38 Or.319, 63 Pac. 489 (1901), on which plaintiff relies in support of its contention that Oregon law should be applied lends support to that position. The later Oregon cases of Casner v. Hoskins, 64 Or.254, 128 Pac.841 (1912), on rehearing 64 Or. 282, 130 Pac. 55 (1913); Eli Bridge Co. v. Lackman, 124 Or. 592, 265 Pac. 435 (1928) and Sterrett v. Stoddard Lumber Co., 150 Or. 491, 46 P.2d 1023 (1935), on a casual perusal would seem to support defendant's theory that where a bill or note is executed in one state and made payable in another, its nature, validity, interpretation and effect is governed by the lex loci solutionis, i.e., the law of the state in which it is payable.
>
> "A closer analysis of these cases leads to the conclusion that they lack authority on these facts. The Washington Investment case is more in point. There, the Oregon court was considering a note and a mortgage on Oregon property, the note being payable in Washington. Here, the note and the trust receipt were executed in Oregon, the trust receipt creating a lien on property in Oregon, with the note payable in California. It is my belief that if the Oregon court was faced with this precise problem, it would follow the law stated in Washington Investment and apply the Oregon law on the effect of the parol evidence rule. Additionally, such an interpretation would conform to the general rule as asserted in Restatement, Conflict of Laws, §599, §312; 3 Beale, Conflict of Laws, §599.1. That the Oregon court considers the Restatement, including First National Bank of Portland v. Noble, 179 Or.26, 69, 168 P.2d 354 (1946), and Daniels v. Parker, 209 Or.419, 306 P.2d 735 (1957)."

We submit that under the laws of the State of Oregon, it is clear that the appellee would not be a holder in due course because there was no proper endorsement. While it is true that the appellee purchased the notes in question and the endorsee, Commerce Acceptance Company, Inc., had no interest in the notes, nevertheless the fact remains that the endorsement

did run to Commerce Acceptance Company, Inc. and not to the appellee. This is the identical situation in First National Bank v. McCullough, 50 Or 508, 93 P 366. In that case, the endorsement was as follows: "Pay A. B. Nixon or Order". A. B. Nixon was the cashier of the plaintiff bank which had purchased the note for value without notice and before maturity. The lower court had instructed the jury, as a matter of law, that the note was subject to defenses. In affirming, the court stated:

> "The uniform practice of merchants in transferring credits, represented by commercial paper, as a means of purchasing goods or settling accounts, gave rise to certain rules, demanded by the wants and conveniece of trading communities, which are known as the law merchant, and have become a part of the common law: (citing cases) An observance of these rules requires that the property represented by a promissory note, payable to order, when transferred to a designated party before maturity for a valuable consideration and without notice, should be evidenced by an indorsement on the instrument, or on a paper attached thereto, in order to bar the equities of antecedent parties. This method of transferring such property constitutes the ordinary or usual course of business, a departure from which is equivalent to a notice of equities, and subjects the negotiable instrument to defenses in the hands of a holder who has acquired a right thereto in any other manner; (citing cases)."

Although the lower court distinguished this case on the ground that it was not clear from the opinion as to whether or not it was Nixon or the plaintiff bank who actually purchased the note, an examination of the Supreme Court of Oregon briefs in this case, which contain extracts from the bill of exceptions in this case, make is clear that it was the bank which

purchased the note. Therefore, what the court states should be read in the light of this fact. The situation is no different in this Oregon case than it was in the case at bar. Everything that could be said here is said there. There was no question but what the bank had the right to sue on the note and was the owner thereof. The same is true here. Appellee owned the two notes in question and had the right to sue on them. However, the ordinary rules of assigned choses in action apply. Hence the appellants are not deprived of their day in court as far as their defenses are concerned.

The situation in regard to this faulty endorsement adds support to the first portion of our brief. This is not a case in which commercial paper in the channels of commerce was discounted by appellee. If that had been the case, certainly appellee would not have purchased such commercial paper with an endorsement running to some entirely different corporation. This merely shows that in truth and in fact the notes, including all of their terms and conditions, were issued to comply with the commitment of the appellee that it would finance the transaction in question. When appellee purchased the notes, it was not buying commercial paper --- it was merely complying with its existing contractual duty and obligation to purchase the notes of these two particular makers (the appellants), provided they were in the amounts, including principal, finance charges, and monthly payments, in accordance with Fuline's approved applications for approval of financing (see Exhibit 10-C).

CONCLUSION

The judgment entered herein in favor of the appellee should be vacated and this action should be returned to the lower court for a trial on the merits.

Respectfully submitted,

DENTON G. BURDICK, JR.
HUTCHINSON, SCHWAB & BURDICK

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DENTON G. BURDICK, JR.

Of Attorneys for Appellants

APPENDIX A
(Exhibits)

All of the exhibits are identified in the pre-trial order (R.70 to 73). The following table refers to the record pages where the exhibits were offered and received:

Exhibit No.	(R. Tr.) Offered	(R. Tr.) Received
1	3	3
2	3	3
3	3	3
4	3	3
5	3	3
6	3	3
7	3	3
8	3	3
9	3	3
10-A	3	3
10-B	3	3
10-C	3	3
73	5	5
101	3	4
102	3	4
103	3	4
104	3	4

Exhibit No.	Offered	Received (R. Tr.)
105	3	4
106	3	4
110	3	4
111	3	4

APPENDIX B

The following is a copy of Exhibit 8:

CORRECTED ASSIGNMENT

WHEREAS, the undersigned, THE FULINE CORPORATION, for a valuable consideration sold to Commercial Acceptance Corporation a certain promissory note dated June 12, 1962 in the principal sum of $23,871.24, made by Earle G. Swanson & Helen F. Swanson, as makers, to the order of the undersigned, as payee, secured by a purchase money chattel mortgage covering forty hot drink dispensers, and

WHEREAS, by mistake the assignments of such promissory note and such chattel mortgage erroneously stated the name of the assignee to be "Commerce Acceptance Company, Inc." rather than "Commercial Acceptance Corporation", although Commercial Acceptance Corporation furnished the consideration for such purchase and it was intended that such promissory note and chattel mortgage would be assigned to Commercial Acceptance Corporation,

NOW, THEREFORE, the undersigned hereby sells, assigns, transfers, sets over and conveys unto Commercial Acceptance Corporation all of its right, title, and interest in and to that certain promissory note dated June 12, 1962 in the principal sum of $23,871.24 made by Earle G. Swanson & Helen F. Swanson to the order of The Fuline Corporation and that certain purchase money chattel mortgage dated June 12, 1962 covering forty hot drink dispensers, securing such note, together with any and all guarantees, agreements, and other collateral instruments; such assignment to be for the express purpose of correcting a prior assignment by the undersigned of such note, chattel mortgage and other instruments, heretofore made erroneously to "Commerce Acceptance Company, Inc." instead of to Commercial Acceptance Corporation.

IN WITNESS WHEREOF, the undersigned has hereunto executed this corrected assignment.

THE FULINE CORPORATION

By A. A. GRIFFITH
President

This corrected assignment is hereby acknowledged:

COMMERCE ACCEPTANCE COMPANY, INC.

By D. C. HUTCHINSON
Vice President

APPENDIX C

The following is a copy of Exhibit 105:

CORRECTION, CLARIFICATION AND AMENDMENT OF "CORRECTED ASSIGNMENT"

WHEREAS, the undersigned, The Fuline Corporation, for a valuable consideration paid by Commercial Acceptance Corporation, sold and delivered to Commercial Acceptance Corporation a promissory note dated June 12, 1962 in the principal sum of $23,871.24 made by Earle G. Swanson and Helen F. Swanson, makers to the order of the undersigned, The Fuline Corporation, as payee, which said note was secured by chattel mortgage dated June 12, 1962 executed by the said Earle G. Swanson and Helen F. Swanson as Mortgagor in favor of The Fuline Corporation as Mortgagee, which said chattel mortgage was sold and delivered to Commercial Acceptance Corporation, and

WHEREAS, the said promissory note was endorsed by The Fuline Corporation to Commercial Acceptance Corporation by execution of the writing on the reverse side of said note, which said endorsement misspelled and wrongly designated the name of Commercial Acceptance Corporation as "Commerce Acceptance Company, Inc.", and

WHEREAS, the said chattel mortgage was assigned by The Fuline Corporation to Commercial Acceptance Corporation by the execution of a writing on the second page of said chattel mortgage below the word "ASSIGNMENT", which said assignment inadvertently misspelled and wrongly designated the name of Commercial Acceptance Corporation as "Commerce Acceptance Company, Inc.", and

WHEREAS, Commerce Acceptance Company, Inc. was and is a corporation which is the 100% owner of Commercial Acceptance Corporation, and

WHEREAS, at no time did, nor was it intended that, Commerce Acceptance Company, Inc. (a) purchase or agree to purchase the said note and chattel mortgage (b) pay or give any consideration in payment for said note and chattel mortgage (c) receive possession or title to said note and chattel mortgage or (d) become a holder or an endorsee of said note, and

WHEREAS, by an undated instrument entitled "CORRECTED ASSIGNMENT" (hereinafter called the "Corrected Assignment") executed by The Fuline Corporation and acknowledged by Commerce Acceptance Company, Inc., a copy of which "Corrected Assignment" is attached hereto, The Fuline Corporation attempted and intended to indicate and acknowledge the true state of the facts and intentions of the parties with respect

pendix C (continued)

o said note and chattel mortgage, as said facts are set forth n the preceding four paragraphs herein, but in so doing anguage was utilized in said "Corrected Assignment" which did ot set forth the true state of the facts and which incorrectly et forth the acts of The Fuline Corporation which were in- ended to be carried out and expressed by said "Corrected ssignment", and

WHEREAS, The Fuline Corporation desires to amend and orrect the said "Corrected Assignment" so as to correctly set orth the facts and to correctly express and carry out the ntention and acts of The Fuline Corporation;

NOW THEREFORE, the undersigned The Fuline Corporation ereby amends, modifies and corrects the said "Corrected ssignment" by:

1. Deleting the first two paragraphs of said Corrected Assignment" and substituting therefore the first our paragraphs set forth hereinabove in this instrument nd

2. Deleting the third paragraph of said "Corrected ssignment" and substituting therefore the following:

> "NOW THEREFORE, (a) the undersigned hereby acknowledges and states that that certain assignment by it to Commercial Acceptance Corporation of the above described chattel mortgage inadvertently misspelled and wrongly designated the name of said Commercial Acceptance Corporation as "Commerce Acceptance Company, Inc." and the words "Commerce Acceptance Company, Inc." in said Assignment of chattel mortgage are hereby corrected to read "Commercial Acceptance Corporation" and (b) the undersigned hereby acknowledges and states that that certain writing executed by it on the reverse side of said promissory note was, and was intended to be, an endorsement of said note to Commercial Acceptance Corporation and that said endorsement of said note inadvertently misspelled and wrongly designated the name of said Commercial Acceptance Corporation as "Commerce Acceptance Company, Inc."

IN WITNESS WHEREOF, the undersigned has hereby executed this strument.

THE FULINE CORPORATION

ppendix C (continued)

The foregoing instrument is hereby acknowledged to be a rue and correct statement of the facts and the intentions of he parties as recited therein.

COMMERCIAL ACCEPTANCE CORPORATION

By D. C. HUTCHINSON, V.Pres.

COMMERCE ACCEPTANCE COMPANY, INC.

By D. C. HUTCHINSON, V.Pres.